TNT Skypack, Inc. *and* Local 851, International Brotherhood of Teamsters, AFL–CIO. Cases 29–CA–17314 and 29–CA–17425

May 30, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On February 17, 1995, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to offer employee Jose Vasquez immediate and full reinstatement to his former job at the John F. Kennedy facility or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, TNT Skypack, Inc., Long Island City, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Marcia Adams, Esq., for the General Counsel.
Robert A. Newell, Esq., for the Employer.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on February 17, April 18, and July 18, 1994, and January 9, l995. The charge and first amended charge in Case 29–CA–17314 was filed by the Union on May 3 and 10, l993. A complaint based on that charge was issued by the Regional Director on June 17, 1993. The charge in Case 29–CA–17425 was filed by the Union on June 16, 1993, and a complaint based on that charge was issued on July 29, 1993. Thereafter, on February 10, 1994, the Regional Director issued an order consolidating cases. The complaints alleged in substance: (1) That on or about December 9, 1992, the Respondent discharged Jose Vasquez because of his membership in and activities on behalf of Local 295 International Brotherhood of Teamsters; and (2) that in January or February 1993, the Respondent although reinstating Vasquez at a different location, interrogated him about his prior union activities and impliedly conditioned his reemployment on his refraining from engaging in any union activities.

The Company asserts that Vasquez was discharged because he failed to punch out when he took his lunchbreak on December 5, 1992, and therefore was guilty of ''stealing time.'' The Company denies the second allegation.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Company is engaged in the business of providing international courier services. To the extent relevant to the case, the Company has a facility at the John F. Kennedy Airport and another facility in Long Island City, New York. (Respectively called the JFK and LIC facilities.) Jose Vasquez was hired as a truck driver in May 1992 and worked at JFK until December 9, 1992. He was rehired in February 1993 to work at the LIC facility.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent has excepted to the judge's characterization of its defense as ''analogous to an insanity defense.'' Although we disavow that characterization, we agree with the judge that the Respondent has not rebutted the General Counsel's prima facie case. We note first that the judge implicitly credited Vasquez' testimony that the Respondent threatened to discharge any employee who was soliciting authorization cards. The record also shows that the Respondent's attorney stated that the Respondent does not ''challenge'' the fact that it had knowledge of Vasquez' union activity. Finally, the Respondent's attorney, in his closing statement, admitted that if local management had followed company policy and contacted headquarters, Vasquez would not have been terminated. Accordingly, we find that the Respondent failed to show that it would have discharged Vasquez in the absence of Vasquez' union activities. *Wright Line*, 251 NLRB 1083 (1980).

[3] The judge inadvertently omitted part of the Board's standard make-whole relief from his recommended remedy. We correct this error.

Vasquez testified that in September 1992 he contacted Mike Reader from Local 296 International Brotherhood of Teamsters and spoke to him about organizing the employees at the JFK facility. Vasquez states that he spoke to other employees and solicited authorization cards for the Union. In this regard, Vasquez testified that he obtained cards signed by about 25 employees and returned them to the Union at a meeting held in September that was attended by about 20 other employees.[1]

According to Vasquez, in October 1992, Supervisor Denton Graham told him that he was told by his superiors that whoever was giving out union cards would be fired if he didn't stop. Vasquez testified that this statement was made at a shift meeting in the lunchroom held with the night-shift workers about 12:30 a.m. Vasquez states that the meeting mostly dealt with work matters during which another employee, Edward Galaraza, asked why the Company was threatening the workers. Vasquez testified that Graham said that it was out of his hands; that he was just a supervisor who gets the message out.

Regarding the above, the General Counsel attempted for many months, without success, to obtain the appearance of Galaraza as a witness. She produced no other witnesses to corroborate the testimony of Vasquez regarding the alleged threat. (This statement is not alleged as a separate violation of the Act in the complaint as it would have occurred more than 6 months before the charge was filed and therefore was barred by Section 10(b) of the Act.)

For his part, Denton Graham, who was the supervisor on the midnight to 8 a.m. shift, denied making such a threat. He does concede, however, that he was aware of union organizing in the autumn of 1992 and that this subject was talked about at shift meetings.

In December 1992 Vasquez' normal shift was 4 p.m. to midnight from Tuesday through Saturday. On Friday, December 4, 1992, the Company asked for volunteers to work the first shift on Saturday, December 5, and Vasquez volunteered. (This would be from 8 a.m. to 4 p.m.) Therefore, as his normal shift for Saturday was to go from 4 p.m. to midnight, this meant that he was now scheduled to work for the 24-hour period from Friday/Saturday at midnight until midnight on Saturday/Sunday.

Vasquez' timecard indicates that he punched out for a lunchbreak at 6:02 on Saturday morning. The timecard also indicates that he did not punch out again until he left at 9:18 p.m. on Saturday night. That is, the card does not indicate that Vasquez punched out for any other breaks from Saturday morning until Saturday night.

According to Vasquez about 9 p.m. he began to feel sick and tired, having worked for 20 straight hours. He states that he asked Supervisor Amy Padgett if he could leave and she refused, saying that he was the only driver that she had available. Vasquez states that he then went to see Bill Amaroso, the night manager, told him that he was not feeling well, and told him that he wanted to go home. According to Vasquez, when Amaroso said that Peter Gagliano was the person to see, he went to Gagliano's office and told him that he had already worked three shifts and was too tired to continue. At this point, Vasquez states that he was asked to wait outside the office whereupon Amy Padgett came out after a few minutes and told him that he could leave. According to Vasquez, as he was leaving, she pulled his timecard out of the rack and asked him if he was going to punch out. He states that he did and she signed it.

Padgett testified that she was the supervisor on the 4 p.m. to midnight shift on Saturday, December 5, 1992. She states that about 7:30 or 8 p.m., she saw Vasquez in the kitchen and that when she asked him what he was doing, he said that he was on his lunchbreak. She testified that shortly thereafter, she asked Vasquez when he was going to go back to work and that he responded that he was very tired. (She acknowledges that he looked very tired.) Padgett states that the next time she saw Vasquez, he was packing up and said he was leaving. At this point, Padgett states he told Amaroso that Vasquez looked tired and that they both told Pete Gagliano that Vasquez wanted to go home. She states that Vasquez was called into Gagliano's office where he was allowed to go home as it was judged that it would be unsafe to allow him to drive. According to Padgett, when Vasquez punched out, he handed her his card and she noticed and commented in front of Gagliano that he hadn't punched out for lunch. She states that she had no further contact with Vasquez after this point and was not consulted about his termination.

The next thing that happened was that on Wednesday, about 7 p.m., Vasquez was told by Tim Sullivan and Bill Amaroso that he was being discharged for ''stealing time,'' to wit, that he had not punched out for a 1/2-hour lunchbreak on the previous Saturday. This led to a heated dispute, the details of which are not relevant.

The Company maintains that it has a fixed policy of discharging employees who steal time and described three examples when employees were discharged for this offense. None of the cited examples, however, were even remotely similar to the situation that Vasquez faced on Saturday, December 5, 1992. Thus, in the examples given by the Respondent, it is clear that those employees deliberately and knowingly claimed that they were entitled to substantial amounts of paid time for days that they did not work. In Vasquez' case all that one can realistically say is that *at most*, he forgot to punch out for a lunchbreak on the last shift that he worked on December 5. That such a ''mistake'' could only have been due to a lack of sleep was obvious to all of his supervisors who would see that he was out on his feet. (As noted above, Padgett had to remind Vasquez to take his card out of the rack and punch out.)

The fact is that the Company could produce not one example of another employee being discharged (or even disciplined) under circumstances similar to Vasquez'. Indeed, it seems to me that even if any discipline was warranted at all (and I doubt that), the discharge of Vasquez for failing to punch out for an 1/2-hour lunchbreak at a time when he was all but asleep at his job, strikes me as being so disproportionate as to amount to evidence of pretext.[2]

[1] According to Vasquez, the Company had about 60 employees working on three shifts at the JFK facility in the autumn of 1992.

[2] In *Greco & Haines, Inc.*, 306 NLRB 634 (1992), the Board stated:

> Under Board precedent, a prima facie case may be established by the record as a whole and is not limited to evidence presented by the General Counsel . . . . Thus, the absence of any legitimate basis for an action may form part of the proof of the General Counsel's case . . . .

The Company's attorney essentially acknowledges that the Respondent had no legitimate reason for discharging Vasquez and he asserts what is analogous to an insanity defense. He maintains that although Vasquez' discharge was stupid and unwarranted, this nevertheless does not mean that it was motivated by antiunion considerations. Perhaps not in the abstract. But given the fact that Vasquez was the leading advocate for the Union, the Company's knowledge of union activities and the lack of any reasonable, rational, or even understandable reason for discharging Vasquez, I conclude, utilizing the test enunciated in *Wright Line*, that the Respondent discharged him in violation of Section 8(a)(1) and (3) of the Act. *Wright Line*, 25l NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Greco & Haines, Inc.*, 306 NLRB 634 (1992).

On January 29, 1993, the Company, by its attorney, sent a letter to Vasquez, advising him of the possibility of employment at the Company's facility in Long Island City. Vasquez, on receiving the letter, called Mike Patterson and arranged for an interview in early February. The LIC employees were represented by Local 852, International Brotherhood of Teamsters that was then in the process of attempting to negotiate a contract with the employer.

Vasquez was interviewed by Mike Patterson and Heather Groeneveld. According to Vasquez, at the outset of the meeting, Groeneveld said that the Long Island City facility was union shop and that there were no problems like those at the JFK facility. Vasquez states that he was asked what led to his discharge at JFK and he said that he believed it was caused by his attempts to organize for Local 295. He indicated that after making this statement, he was asked by Groeneveld if he was the one who brought the Union to JFK and that she asked why he did it. Vasquez testified that he responded that the reason he contacted Local 295 was because he believed that the Company discriminated against Blacks and Hispanics. According to Vasquez, neither Patterson nor Groeneveld said that he should not undertake any union activity at the LIC facility and that they merely said that there already was a union at this location. He states that there already was a union at this location. He states that they then discussed wages and benefits. After being asked some leading questions, Vasquez recalled that Groeneveld asked him if he was going to bring any trouble to LIC and that he answered that he didn't think so because they already had a union there.

Patterson testified that prior to the interview he spoke to Company Attorney Newell about the possibility of employing Vasquez and that the interview was set up in conjunction with the letter that Newell sent to Vasquez on January 29. Heather Groeneveld testified that prior to the interview she had been told that Vasquez had previously worked at JFK, that he had been a good worker, and that he had been fired as a result of a disagreement between him and his supervisors.

According to Groeneveld, she and Patterson first described the job, the hours, and the salary. She states that she told Vasquez that this facility was the only union facility, that the employees had voted for the Union in September 1992, and that as there was not yet a contract he would not get raises until one was signed. She states that Patterson asked Vasquez what had happened to him at JFK and that Vasquez related what had happened. She states that there was no further conversation about unions either at the JFK or LIC facility and she denies that either she or Patterson conditioned Vasquez' reemployment on his cessation of union activity.

Patterson basically corroborated Groeneveld's version of the interview. He testified that Vasquez, after being told about the proposed job, brought up his problems at JFK and his belief that he was discharged there because of his union activities. Patterson states that he and Groeneveld responded that Vasquez' union activities were of no concern to them because there already was a union representing the employees at this facility.

Vasquez was offered and accepted a job as a truckdriver at the LIC facility. He received the same wage as when he worked at the JFK facility, although his hours were changed from the graveyard shift to the first shift from 8:30 a.m. to 4:30 p.m. After starting work, he asked about a raise and was told that the Company was in negotiations with Local 851 and therefore he would have to wait to receive whatever the contract rate called for.

Based on the testimony of all three participants in the interview, I do not think that the Company violated the Act as alleged in the complaint. To the extent that Vasquez talked about his union activity, this seems to have been volunteered by him in response to a question regarding the cause of his discharge at the JFK facility and not in response to any unlawful interrogation regarding his union activities. Further, the evidence does not, to my mind, establish that either Patterson or Groeneveld conditioned Vasquez' employment on his cessation of union activity. For one thing, there already was a union at the LIC facility and his potential union activity was not likely to make any difference to anyone. For another, Vasquez concedes that neither Patterson nor Groeneveld told him that he should not undertake any union activity at the LIC facility. Indeed, there really is nothing in Vasquez' testimony that would lead me to conclude that such a condition was imposed on him.

CONCLUSIONS OF LAW

1. By discharging Jose Vasquez because of his activity on behalf of Local 295, International Brotherhood of Teamsters, the Company violated Section 8(a)(1) and (3) of the Act.

2. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

Continued

ORDER

The Respondent, TNT Skypack, Incorporated, Long Island City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Local 295, International Brotherhood of Teamsters or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Jose Vasquez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility at John F. Kennedy airport copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 295 International Brotherhood of Teamsters or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Jose Vasquez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

TNT SKYPACK, INCORPORATED